

1 John W. Larson, District Judge
2 Fourth Judicial District, Dept. 3
3 Missoula County Courthouse
4 200 West Broadway
5 Missoula, MT 59802
6 (406) 258-4773

7 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

8 THE STATE OF MONTANA,
9 ex rel,

Cause No. XDDV-2012-90

10 THE MONTANA POLICY
11 INSTITUTE, INC., a Montana
12 corporation, by and through its
13 President, CARL GRAHAM,

Plaintiff,

vs.

OPINION AND ORDER DENYING
STATE'S MOTION TO DISMISS
CONVERTED TO MOTION FOR
SUMMARY JUDGMENT

14 DAVID GALLIK, GALLIK LAW
15 OFFICES, a Montana professional
16 Limited Liability Company, GAIL
17 GALLIK, VIVIAN HAMMILL and
18 PAULA STOLL,,
19

Defendants.

20 This matter comes before the Court on State of Montana, by its
21 Special Assistant Attorney General's Motion to Dismiss. The Court heard
22 oral argument, received supplemental documentation, and the matter is
23 ready for decision.

24 **Background**

25 The Court finds the facts as the following. Defendant David Gallik has
26 owned Gallik Law Offices, PLLC, since February 2006. In May 2011,
Governor Brian Schweitzer appointed Mr. Gallik to serve as the State of

1 Montana's Commissioner of Political Practices ("Commissioner"). On
2 October 24, 2011, The Montana Policy Institute (MPI) directed Dave Brown
3 to submit an open records request to the Commissioner's office, seeking Mr.
4 Gallik's time cards, records for work time submitted to the State, and emails
5 that were sent to and from Mr. Gallik since he served as Commissioner.
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7 In January 2012, Great Falls Tribune journalist John Adams also
8 submitted an open records request to the Commissioner's office. On
9 January 15, 2012, the Great Falls Tribune published an article written by Mr.
10 Adams about Mr. Gallik's alleged misuse of State time and resources,
11 including Mr. Gallik's failure to properly record time, Mr. Gallik's work for
12 private clients while in the Commissioner's office, and Mr. Gallik's use of
13 government equipment for the benefit of his private clients. On January 18,
14 2012, Mr. Gallik resigned as Commissioner.
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17 On January 27, 2012, Carl Graham, President of MPI, submitted an
18 open records request to the Commissioner's office, requesting copies of Mr.
19 Gallik's emails and timesheets. On January 30, 2012, Mr. Graham
20 submitted another open records request to the Commissioner's office,
21 requesting time sheets from May 2011 through December 2011 and all
22 emails pertaining to the allegations that Mr. Gallik conducted private
23 business on state time or used state resources.
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1 On February 7, 2012, MPI filed a Complaint against Mr. Gallik, Gallik
2 Law Offices, Governor Schweitzer's Chief of Staff Vivian Hammill, Mr.
3 Gallik's wife Gail Gallik, and the Montana Department of Administration
4 supervisory employee Paula Stoll, asserting violations of Section 17-8-403,
5 MCA, pursuant to the False Claims Act ("Act"). MPI's allegations against Mr.
6 Gallik charge that Mr. Gallik made false claims by submitting payment
7 requests to the State that inaccurately reflect actual time worked for the
8 Commissioner's office or work performed for Mr. Gallik's private clients. MPI
9 alleges that Ms. Hammill and Ms. Stoll failed to take action to prevent Mr.
10 Gallik's timekeeping irregularities. MPI also alleges that Ms. Gallik used
11 state equipment for personal uses. MPI's Complaint with supplemental
12 documentation was presented to the office of the Montana Attorney General
13 on or about February 6, 2012. See State Exh. 2.
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18 The State now moves to dismiss MPI's Complaint with prejudice
19 pursuant to Sections 17-8-406 and 407, MCA, on the grounds that MPI: 1)
20 lacks standing to bring this action, and 2) the allegations in the Complaint do
21 not state a meritorious claim against any Defendant. Because the Court
22 allowed evidence outside the pleadings to be considered in the dismissal
23 hearing, the Court hereby converts the State's Motion to Dismiss to a
24 summary judgment motion under Rule 56, M.R.Civ.P.
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Standard

Pursuant to Rule 12(d), M.R.Civ.P., "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Under Rule 56, M.R.Civ.P., summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Montana Supreme Court explained the standard as follows:

The movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law.

Mathews v. BJS Constr., Inc., 2003 MT 116, ¶ 12, 315 Mont. 441, 444-45, 68 P.3d 865, 868 (citing *Oliver v. Stimson Lumber Co*, 1999 MT 328, ¶ 21, 297 Mont. 336, 342, 993 P.2d 11, 16 (quoting *Bruner v. Yellowstone County*, 272 Mont. 261, 264-65, 900 P.2d 901, 903 (1995))).

Discussion

I. Standing

The State asserts that MPI has no standing to bring this false claims action because Mr. Gallik's alleged conduct described in the Complaint was performed within the scope of Defendant Gallik's duties to the State, and Section 17-8-403(5)(a), MCA, excludes such conduct performed within the scope of the employee's duties to a governmental entity as a basis for filing a false claims action. The State also argues that the allegations in the Complaint mirror the allegations that were publicly disclosed in news articles, and therefore, the false claim allegations cannot be sustained against Mr. Gallik because MPI has not identified direct and independent knowledge of the information on which the allegations are based. § 17-8-403(5)(c), MCA. The State also argues that MPI failed to comply with the legal requirement to disclose to the State all material evidence and information that MPI possessed pursuant to Section 17-8-406(2), MCA.

MPI responds that the Act does not preclude MPI from bringing this action because the limitations for filing a viable false claims under the Act found in Section 17-8-403(5), MCA, do not apply to the facts of this case. MPI argues that an employee, who receives compensation for time that the employee knowingly did not work, is not the type of job duty contemplated in

1 Section 17-8-403(5)(a), MCA, which precludes a person from bringing an
2 action against a government employee if that employee performed a task
3 that was within the scope of his job duties.

4 MPI also argues that the limitation in Section 17-8-403(5)(c), which
5 precludes a person from bringing a false claims action if that person relies
6 upon allegations or transactions set forth in certain types of investigations,
7 actions, hearings, or the news media, does not apply in this case. MPI
8 asserts that it based the subject action upon information it obtained from the
9 employees at the Commissioner's office, not allegations in any of the news
10 articles. MPI also asserts that the information that MPI gave to the State
11 when MPI filed the Complaint consisted of more extensive and detailed
12 information than that which was published in the news articles. See State's
13 Exhibit 11. MPI argues that Mr. Graham received more information than Mr.
14 Adams received through additional emails that were discovered after Mr.
15 Gallik resigned and through a more detailed time log showing the
16 discrepancies in Mr. Gallik's time that was recreated by the Commissioner's
17 office staff. Finally, MPI argues that none of the published articles regarding
18 Mr. Gallik's misuse of State resources contained allegations against the
19 other Defendants in this action, and the limitations for filing a false claim do
20 not apply to those Defendants.
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1 Section 17-8-406, MCA, provides that a person may bring a civil action
2 for a violation of the Act on behalf of the person and the governmental entity.

3 Section 407 of the Act authorizes the State to unilaterally seek dismissal
4 before Defendants appear in the action. In pertinent part Section 17-8-407,
5 MCA, states,
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7 "[o]n the motion of the government attorney, the court may dismiss a
8 civil action notwithstanding the objection of the person who initiated
9 the action if the government attorney has notified the person of the
10 filing of the motion to dismiss and the court has given the person an
11 opportunity to oppose the motion and present evidence at a hearing."

12 Section 17-8-403(5) of the Act sets certain limitations on filing a
13 complaint or civil action in accordance with the Act. Section 17-8-403(5)(a)
14 of the Act precludes a person from filing a complaint or civil action against
15 "an officer or employee of a governmental entity arising from conduct by the
16 officer or employee within the scope of the officer's or employee's duties to
17 the governmental entity." For conduct to fall within the scope of
18 employment, it "must be of the same general nature as that authorized, or
19 incidental to the conduct authorized." *Kornec v. Mike Horse Mining & Milling*
20 *Co.*, 120 Mont. 1, 8, 180 P.2d 252, 256 (1947). An employer who acts
21 entirely for his own benefit is generally held to be outside the scope of his
22 employment. *Id.*
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26 Section 17-8-403(5)(c) of the Act precludes a party from filing a

complaint or civil action:

that is based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing or in an investigation, report, hearing, or audit conducted by or at the request of the senate or house of representatives, the state auditor or legislative auditor, the auditor or legislative body of a political subdivision, or the news media...

However, there is an exception to this limitation which allows a person to initiate an action even if it is based upon the public disclosure of allegations in a news report if that person:

...has direct and independent knowledge of the information on which the allegations are based and, before filing the complaint or civil action, voluntarily provided the information to the agency of the governmental entity that is involved with the claim that is the basis for the complaint or civil action and unless the information provided the basis or catalyst for the investigation, report, hearing, or audit that led to the public disclosure;

§ 17-8-403(5)(c), MCA.

This Court has determined that Mr. Gallik's alleged conduct of submitting false claims did not arise within the scope of the Mr. Gallik's duties to the State, and Section 17-8-403(5)(a), MCA, does not preclude MPI from filing this action on such grounds. MPI also complied with the Act's requirement to serve on the government attorney a copy of the Complaint and written disclosure of substantially all material evidence and information that the person possesses. § 17-8-406(2), MCA; See Pltff. Response to Motion, Exh. 2; State's Exh. 2.

1 Next, the information which MPI based its Complaint did not originate
2 from "any public disclosure of allegations or transactions in a criminal, civil,
3 or administrative hearing... or the news media" per Section 17-8-403(5)(c),
4 MCA. Evidence before the Court shows MPI based its Complaint on
5 information that MPI requested from staff members at the Commissioner's
6 office, which information was voluntarily produced as early as October 2011,
7 prior to and independent of the news articles. Mr. Graham, Mary Baker, who
8 has worked in the Commissioner's office for the past ten years, and Julie
9 Steab, who has worked in the Commissioner's office for the prior two years,
10 testified at the dismissal hearing that Mr. Brown submitted an open records
11 request to the Commissioner's office months before Mr. Adams began
12 investigating the matter. See Pltff. Exh. 419. Mr. Graham also testified that
13 MPI paid for the cost of the copies Mr. Brown received in response to the
14 request. Ms. Steab and Ms. Baker also testified that Mr. Graham received
15 material information that Mr. Adams did not receive for his article (e.g., more
16 detailed time sheets, office notes, and email correspondence pertaining to
17 Mr. Gallik's private law practice or personal business). Thus, MPI's
18 Complaint is not based upon allegations in the news articles that were
19 published in the Great Falls Tribune and Helena Independent Record, but
20 from sources that provided information to MPI prior to the publication of the
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1 news articles. See Pltff. Response to Motion to Dismiss, Exhibits 1-a, 1-b,
2 1-c.

3 The limitations for filing a civil action outlined subsection 17-8-
4 403(5)(a) and (c), MCA do not apply to the facts of this case, nor do the
5 exceptions. Therefore, State has not met its burden in establishing that the
6 Act precludes MPI from proceeding in this matter.
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8 **II. False Claim Allegations**

9 The State argues that there has been no provable loss to the State
10 because Mr. Gallik was never paid more than his agreed annual salary. The
11 State argues the other state and federal courts have construed similar false
12 claims laws and held that submission of false claims do not violate a False
13 Claims Act absent a loss to the government. See, e.g., *Hutchins v. Wilentz*,
14 *Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001). The State concedes that it
15 may be true that Mr. Gallik recorded time that he did not actually perform
16 work for the Commissioner's Office; however, there has been no loss to the
17 State of Montana. See State's Post Hearing Response Brief, p. 11. The
18 State argues that Montana statutes on state employee classification and
19 compensation do not apply to members of commissions or boards, or
20 agency heads, appointed by the Governor. M.C.A. § 2-18-101, *et seq.*;
21 M.C.A. § 2-18-103. As such, the State argues that Mr. Gallik, as
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1 Commissioner, was a salaried, exempt employee who was not subject to
2 time keeping requirements of an hourly wage employee. The State also
3 argues in its Post Hearing Memorandum that no false claim liability attaches
4 to Defendants Vivian Hammill, Paul Stoll, or Gail Gallik. See State Post
5 Hearing Memo, p.4. MPI responds that dismissal is unwarranted because
6 the claims against Mr. Gallik are factually complex and disputed, involving
7 differences in recollection or perception.
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10 During the motion to dismiss hearing, Mr. Gallik admitted that
11 occasionally he would receive emails pertaining to his private practice on his
12 State email account, and evidence in the record supports this admission.
13 For example, evidence in the record shows that on July 7, 2011, Mr. Gallik
14 received approximately eight emails pertaining to his private practice. See
15 Pltff. Exhs. 151, 157, 154, 158, 159, 160. Evidence before the Court
16 indicates that on August 2, 2011, Mr. Gallik contacted Deb Belleau in the
17 Human Resources Policy and Programs Bureau in an attempt to change his
18 employment status from hourly to exempt salary. See Pltff. Exh. 212. On
19 August 8, 2011, Mr. Gallik also contacted Vivian Hammill at the Governor's
20 office in another attempt to clarify his employment status as a salaried
21 exempt employee. See Pltff. Exh. 84. There is a question of material fact
22 regarding whether Mr. Gallik was a salaried, exempt employee or paid on an
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hourly basis.

1 After considering the documents in the Court's record as well as
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3 testimony and evidence presented by the parties at the dismissal hearing,
4 there are disputed material facts regarding the basis of liability for the false
5 claim action against Mr. Gallik, precluding summary judgment. There are
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7 also genuine issues of material fact regarding whether the remaining
8 Defendants had the requisite knowledge under the Act so to have violated it.
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10 The State has primarily focused on its arguments that Mr. Gallik's acts were
11 within his job duties as Commissioner and MPI based its Complaint on news
12 articles, failing to adequately show why the action should be dismissed as to
13 the remaining Defendants named in the Complaint. Additionally, there was
14 limited or no testimony presented at hearing regarding the State's recently
15 proposed dismissal of all Defendants. Therefore, the Court declines to
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17 address the State's motion to dismiss regarding the other Defendants as the
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19 issue has not been sufficiently briefed and argued at this time.

20 IT IS HEREBY ORDERED that subsections 403(5)(a) and (c) of the
21
22 Act do not preclude MPI from proceeding in this matter.

23 IT IF FURTHER ORDERED that the State's Motion to Dismiss,
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25 converted to a Motion for Summary Judgment is **DENIED**.
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1 IT IS FURTHER ORDERED that the State has ten (10) days after the
2 date on this Order to elect to intervene and proceed with this action or to
3 notify the Court that it declines to take over the action in accordance with
4 § 17-8-406(3), MCA. If the State elects to intervene, the State is ordered to
5 serve the Complaint on all Defendants within twenty (20) days after
6 intervening in the action. If the State declines to take over the action,
7 Plaintiff may serve the Complaint on Defendants within the applicable
8 statute of limitations.
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11 DATED this 11th day of April, 2013.

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14 JOHN W. LARSON, District Judge

15 Copies of the foregoing were sent to:

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